

*a***MALAYAN FLOUR MILL BHD****v.****RAJA LOPE & TAN CO***b*

HIGH COURT MALAYA, KUALA LUMPUR
RAMLY ALI J
[ORIGINATING SUMMONS NO: D9-24-134 OF 2000]
13 JULY 2000

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COMPANY LAW: *Winding-up - Injunction to restrain petition - Whether petition used as a means to enforce payment of debt - Whether debt bona fide disputed - Whether presentation of petition and advertisement would cause irreparable damage to debtor company - Whether company's pending appeals to higher court in relation to disputed debt rendered nugatory if successful - Whether company solvent - Balance of convenience and justice of case - Whether in favour of company*

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ARBITRATION: *Award - Enforcement - Winding-up proceedings - Whether leave of court required - Arbitration Act 1952, s. 27*

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The defendant entered into a written agreement with the plaintiff, a public listed company, to construct and maintain civil and building works for a broiler breeder farm for the plaintiff. Disputes and differences arose between the parties which were subsequently referred to arbitration. The arbitrator gave 2 awards, *ie*, the 1st on liability and the 2nd on quantum. The plaintiff's application to set aside the award on liability was dismissed by the High Court. On the other

f hand, the defendant's application to the High Court on the question of interest rate and pre-award interest to be remitted to arbitration was allowed. The plaintiff appealed against both the awards to the Court of Appeal which were still pending. In the interim period, the arbitrator had reconsidered the award on quantum by way of an addendum and correction. In accordance with that,

g the defendant demanded payment of the sum therein and gave notice that if payment was not made within 21 days from the date of the service thereof, the defendant would commence winding-up proceedings against the plaintiff. Hence, the instant application by the plaintiff, *inter alia*, for an injunction to restrain the defendant from presenting and proceeding with any petition for the winding-up of the plaintiff as the sum demanded by the defendant was

h disputed by the plaintiff.

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Held:

[1] A winding-up petition should not be used as a means to enforce payment of a debt which is *bona fide* disputed, *ie*, the debt must be disputed on some substantial grounds.

[1a] The plaintiff disputed the claim or alleged debt right from the stage before arbitration up to the stage the matters were brought to the High Court. Even after filing the appeals and application for stay of execution, the parties exchanged correspondence disputing the debt.

[2] An arbitrator's award, unlike an order or judgment of a court, does not immediately entitle the successful party to levy execution against the assets of the unsuccessful party. The award must be converted into a judgment or order of the court before the successful party can levy execution. As such, the defendant's action to issue notice under s. 218 of the Companies Act 1965 to the plaintiff without first registering the award under s. 27 of the Arbitration Act 1952 was pre-mature.

[3] The presentation of a winding-up petition and its advertisement would cause irreparable damage to the plaintiff. The business and credit reputation of the plaintiff would be immeasurably harmed and injured by the presentation and advertisement of the petition which could not be compensated in damages. Moreover, the presentation of the winding-up petition might be construed as a breach on the part of the plaintiff under its other agreements with other parties. Further, in the event the banks are advised of the winding-up petition, the plaintiff's bank account might be frozen and this would have an adverse effect on the plaintiff's business operation and financial position.

[4] If the plaintiff succeeded in the appeals, it was unlikely that any money paid out to the defendant could be recovered as both the partners in the defendant's firm had at one time been adjudged bankrupt. In the circumstances, the appeals if successful would be rendered nugatory.

[5] The plaintiff was neither unwilling nor unable to make payment of the award sum except for the fact that the plaintiff believed that there was a genuine dispute as to the sum payable. The plaintiff also undertook to abide by any order of damages that this court might assess the defendant to have suffered should it subsequently transpire that the orders herein were wrongfully granted. The plaintiff's last 5 years annual report clearly indicated that the plaintiff was solvent and able to meet any such claim by the defendant.

- a* [6] The balance of convenience and the justice of the case clearly lay in favour of the plaintiff. The plaintiff would suffer greater injustice if the relief was withheld.

[Application granted.]

- b* **Case(s) referred to:**
Bloemen v. Gold Coast City Council [1973] AC 115 (*refd*)
Bremer Oeltransport Gmb v. Drewry [1933] 1 KB 753 (*refd*)
Cheng Hang Guan & Ors v. Perumahan Farlim (Penang) Sdn Bhd & Ors [1988] 3 MLJ 90 (*refd*)
Ganda Holdings Bhd v. Pamaron Holdings Sdn Bhd [1989] 2 MLJ 346 (*refd*)
- c* *Garden Cottage Food Ltd v. Milk Marketing Board* [1984] AC 130 (*refd*)
Keet Gerald Francis Noel John v. Mohd Noor Abdullah & Ors [1995] 1 CLJ 293 (*refd*)
Mann v. Goldstein [1986] 1 WLR 1091 (*refd*)
New Travelles Chambers Ltd v. Cheese and Green (70 LT 271,272) (*fol*)
- d* *Mohamed Abdullah Tpe Abdul Majeed v. Habib Mohamed* [1986] 1 MLJ 526 (*refd*)
Re Great Britain Mutual Life Assurance Society [1880] 16 Ch D 246 (*refd*)
Re Sanpete Builders (S) Pte Ltd [1989] 1 MLJ 393 (*refd*)

Legislation referred to:

Arbitration Act 1952, s. 27

- e* Companies Act 1965, s. 218(2)(a)

Arbitration Act 1950 [UK], s. 26

Other source(s) referred to:

Key to Civil Procedure in Malaysia and Singapore, Janab, 2nd edn, 1995, p 796

- f* *The Law and Practice of Commercial Arbitration in England*, Sir Michael J Mustill & Steward C Boyd, 2nd edn, p 416

For the plaintiff - GH Khoo; M/s Skrine

For the defendant - Krishna Dallumah; M/s Krishna Dallumah

Reported by Usha Thiagarajah

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JUDGMENT

Ramly Ali J:

Plaintiff's Application

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The plaintiff in this case, Malayan Flour Mill Berhad, in encl. 8, applied, *inter alia*, the following interlocutory relief:

- (i) that the defendant, may be restrained whether by themselves, or by their servants or agents or otherwise howsoever from presenting any petition

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to the court for the winding-up of the plaintiff based on the sum of RM2,067,863.85 claimed in the statutory demand pursuant to s. 218 of the Companies Act 1965, dated 25 May 2000 served on the plaintiff; and

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(ii) that the defendant may be restrained whether by themselves, or their servants or agents or otherwise howsoever from proceeding with any petition to the court for the winding-up of the plaintiff based on the sum of RM2,067,863.85 claimed in the statutory demand pursuant to s. 218 of the Companies Act 1965 dated 25 May 2000 served on the plaintiff;

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(iii) that the cost of the application be paid by the defendant;

(iv) such further and other orders as the court deems just and proper.

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Grounds Of The Application

The grounds of the application are:

(i) that any presentation of or proceeding with a winding-up petition against the plaintiff is unlawful and an abuse of the process of the court; and

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(ii) that there is a genuine dispute as to the sum of RM2,067,863.85 claimed by the defendant in the statutory demand pursuant to s. 218 of the Companies Act 1965, dated 25 May 2000 served on the plaintiff.

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Facts Of The Case

The plaintiff is a public listed company, listed on the main board of the Kuala Lumpur Stock Exchange (KLSE). By a written agreement dated 8 March 1989, the defendant firm agreed to construct and maintain the civil and building works for a broiler breeder farm at Batu Kundur, Lumut, Perak for the plaintiff at the times and manner prescribed by the agreement. After sometime, disputes and differences arose between the parties and pursuant to the contract, such disputes and differences were referred to arbitration.

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The arbitration was heard in two parts – the first on liability and the second on quantum. On 6 March 1997 the arbitrator gave an award in respect of the first part of the arbitration (first interim award) in favour of the defendant holding that the plaintiff had breached the contract with the defendant by unlawfully terminating the contract. The plaintiff then applied to set aside the first interim award which was dismissed by the High Court in Originating Motion No: R3-25-62-97 on 16 February 1998. The plaintiff then filed a notice of appeal *vide* Civil Appeal No: W-04-14-1998 (first appeal). As of to date, this first appeal is still pending.

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- a* The second part of the arbitration which dealt with the issue of quantum in the light of the first interim award was heard on 29 December 1998 and 7 January 1999. This resulted in the publication of the second interim award by the arbitrator in respect of quantum of damages on 26 April 1999 and the final award which incorporated interest and cost. However, this time, the defendant applied to the High Court to have the second interim award and the final award be remitted to the arbitration for reconsideration on question of interest rate and pre-award interest and this application was allowed by the High Court by an order dated 17 December 1999. The plaintiff then filed a notice of appeal *vide* Civil Appeal No: W-02-51-2000 (second appeal). As of to date, this second appeal is still pending in the Court of Appeal.

- c* On 21 January 2000, the plaintiff filed an application for stay of execution of the order dated 17 December 1999 pending disposal of the second appeal. This application was adjourned to 19 June 2000 and then to 25 July 2000. In the meantime, the parties had been exchanging correspondence as to whether the arbitrator should defer the proceedings on the remission of the award to him. Notwithstanding the ongoing discussion, the arbitrator then reconsidered the award by way of an addendum dated 2 May 2000 and a correction dated 10 May 2000. In essence, the defendant is demanding payment of the total sum of RM2,067,863.85 allegedly due and outstanding in accordance with the decision of the arbitrator dated 10 May 2000. The defendant has by its solicitor's letter dated 25 May 2000 demanded payment of the said sum and given notice that if payment is not made within 21 days from the date of service thereof, the defendant may commence proceedings to wind-up the plaintiff.

- d* The plaintiff is compelled to make this application for an injunction to restrain the defendant from presenting and proceeding with any petition for the winding-up of the plaintiff on the basis that the aforesaid amount demanded by the defendant is disputed by the plaintiff.

e ***Applicable Principles***

- f* In dealing with issues relating to interlocutory injunction, I am guided by a well-established principle as laid down by Gopal Sri Ram, JCA in delivering the judgment of the Court of Appeal in *Keet Gerald Francis Noel John v. Mohd. Noor Abdullah & Ors* [1995] 1 MLJ 193 (at p. 206). In that case the learned JCA had said that a judge hearing an application for an interlocutory injunction should:

- g* (1) ask himself whether the totality of the facts presented before him disclosed a *bone fide* serious issue to be tried. He must refrain from making any determination on the merits of the claim or any defence to it and identify

with precision the issue raised and decide whether they are serious enough to merit a trial. If he finds that no serious question is disclosed, the relief should be refused. If however, he finds that there are serious questions to be tried, he should move on to the next step of his enquiry;

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- (2) having found that an issue has been disclosed that requires further investigation, he must consider where the justice of the case lies.

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He must take into account all relevant matters, including the practical realities of the case before him and weigh the harm the injunction would result from its refusal. If after weighing all matters, he comes to the conclusion that the plaintiff would suffer greater injustice if relief is withheld, then he would be entitled to grant the injunction especially if he is satisfied that the plaintiff is in a financial position to meet his undertaking in damages. Similarly if he concludes that the defendant would suffer the greater injustice by the grant of injunction, he would be entitled to refuse the relief;

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- (3) the judge must have in the forefront of his mind that the remedy that he is asked to administer is discretionary. Intended to produce a just result for the period between the date of the application and the trial proper and to maintain the *status quo*. It is a judicial discretion capable of correction on appeal. A judge should briefly set out in his judgment the several factors that weighed in his mind when arriving at his conclusion.

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Besides the above proposition, I am also being guided in this case that it is a well-established principle that a winding-up petition should not be used as a means to enforce payment of a debt which is *bone fide* disputed, ie, the debt must be disputed on some substantial grounds: See *Re Great Britain Mutual Life Assurance Society* ([1880] 16 Ch D 246 – followed in *Re Sanpete Builders (S) Pte Ltd* [1989] 1 MLJ 393) – where Jessel MR said:

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in my opinion it is not sufficient for the respondent, upon a petition of this kind, to say “we dispute the claim”. They must bring forward a *prima facie* case which satisfies the court that there is something which ought to be tried either before the Court itself or in an action or by some other proceeding.

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I have also noted another rule which was established in *Mann v. Goldstein* [1986] 1 WLR 1091 – in which it was stated that “it is an abuse of the process of the court to petition to wind-up a company upon the basis of a debt which is so *bone fide* disputed”.

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- a* Based on the above principles, the first thing I have to consider is whether there is a *bona fide* dispute as to the debt claimed against the plaintiff or whether there are *bona fide* serious issues to be tried.

Serious Issues To Be Tried And Bona Fide Dispute As To The Debt

- b* Upon a proper perusal of the various affidavits filed herein and on the totality of the evidence presented before me, I am satisfied that the plaintiff had been disputing the claim or alleged debt, both on liability and quantum, right from the stage before their disputes were referred to the arbitrator, up to the stage when the respective awards were made by the arbitrator, until the matters were brought to the High Court. Both the awards made by the arbitrators, *c* were brought to the High Court and later the plaintiff was serious enough in disputing the debt when it filed two separate appeals to the Court of Appeal on both issues. Both appeals are now pending. The plaintiff had also filed an application for a stay of execution of the order of the High Court dated *d* 17 December 1999 pending disposal of the above appeals. This application is also still pending in the High Court.

- Even after filing the appeals and application for stay of execution, the parties have been exchanging correspondence to the effect that the plaintiff was disputing the debt. There were not less than 16 letters from both sides as *e* well as the arbitrator on this matter. The plaintiff also disputed the status of the defendant as a “creditor” in the context of s. 218(2)(a) of the Companies Act 1965 when the defendant issued the notice under s. 218 to the plaintiff on 25 May 2000 (exh. “TWC-1” in the plaintiff’s supporting affidavit). Section 218(2)(a) of the Companies Act 1965 states that “A company shall *f* be deemed to be unable to pay its debt if – (a) a **creditor** by assignment or otherwise to whom the company is indebted in a sum exceeding five hundred ringgit then **due** has served on the company by leaving at the registered office demand under his hand or under the hand of this agent thereunto lawfully authorised requiring the company to pay the sum **due**, and the company has *g* for three weeks thereafter neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor”.

- The section seems to me very clear. In order for a person to initiate winding-up notice under the section, he must be a “creditor” and the debt must be “due”. Person not within the ambit of the said section cannot initiate any *h* petition for winding-up (see: *Mann v. Goldstein* [1968] 1 WLR 1091 and *Ganda Holdings Bhd. v. Pamaron Holdings Sdn Bhd* [1989] 2 MLJ 346). Therefore, so far as material to our case, if the defendant is not a “creditor”, it is not entitled to present or advertise its petition or apply for winding-up order and it has no *locus standi*. *i*

Since the debt upon which the defendant founded its petition was substantially disputed by the plaintiff, the issues whether the defendant is a “creditor” and whether the debt is “due” needs to be tried and established first.

The defendant has raised a point that where parties have by agreement referred disputes to an arbitrator, the arbitrators’ award is final and binding and this cannot be disputed by the plaintiff. In our present case, it is not disputed that the relevant awards made by the arbitrator had not been registered in the High Court under s. 27 of the Arbitration Act 1952. At one stage of the proceedings, the counsel for the defendant had told the court that the defendant is in the process of taking steps to register the said award. However, nothing had been done by the defendant to effect registration of the award until the hearing of this application.

Section 27 of our Arbitration Act 1952 is *pari materia* to s. 26 of the English Arbitration Act 1950. This section provides for the enforcement of the award which is similar to judgment of court provided leave is obtained from the High Court. If leave is granted to enforce the award “all enforcement proceedings available in the High Court like writ of seizure and sale, garnishee proceeding including bankruptcy or winding-up proceedings will be available to the award holder”. (see: *Janab’s Key to Civil Procedure in Malaysia and Singapore*, 2nd edn, April 1995 at p. 796).

It has been said by Peh Swee Chin J in *Mohamed Abdullah Tpe Abdul Majeed v. Habib Mohamed* [1986] 1 MLJ 526;

the validity of an award of an Arbitrator can still be questioned at the stage of an application to enforce the award. The point of illegality affecting the validity of an award is a recognised ground for contesting the application for leave to enforce such an award. Even if it were not pleaded before the Arbitrator or the High Court it would be the duty of the Court to take a point of illegality even if the parties before it may not take it when this point clearly arises on the evidence.

An arbitrator’s award, unlike an order or judgment of a court, does not immediately entitle the successful party to levy execution againsts the assets of the unsuccessful party. It is first necessary to convert the award into a judgment or order of the court. Only then the successful party can levy execution. (see: *The Law and Practice of Commercial Arbitration in England*, 2nd edn, by Sir Michael J Mustill and Steward C Boyd, p. 416).

Parties to an arbitration agreement impliedly promise to perform a valid award. If the award is not performed the successful party can proceed by action in the ordinary court (High Court) to obtain judgment giving effect to the award. (see: *Bremer Oeltransport Gmb v. Drewry* [1933] 1 KB 753, and *Bloemen v. Gold Coast City Council* [1973] AC 115).

- a* On the strength of the above authorities, I am of the opinion that an arbitrator's award is not final and binding and thus can still be challenged by any of the parties, until it is registered and accepted as a judgment by leave of the High Court. In this case, the defendant's action to issue notice under s. 218 of the Companies Act 1965 to the plaintiff without first registering the award under s. 27 of the Arbitration Act 1952, is pre-mature in the context of the present proceedings.

Having found that the debt in question is genuinely disputed and there are serious issues to be tried, it is now necessary for me to consider where the justice of the case lies.

c ***Justice Of The Case***

- d* In making this assessment, I must take into account all relevant matters including the balance of convenience, the practical realities of this case, the harm on both parties if injunction is granted as against the harm if injunction is refused, as well as the financial standing of both parties.

Balance of Convenience/Harm On Parties

- e* The plaintiff at all material times, is a public listed company whose shares are traded on the main board of the Kuala Lumpur Stock Exchange (KLSE). In the event a winding-up petition is presented against the plaintiff, the statutory restrictions which would arise make it virtually impossible for the plaintiff to carry on its own business activities. The presentation of a winding-up petition and its advertisements as required by the Winding-up Rules 1972 would cause irreparable damage to the plaintiff given that the business and credit reputation of the plaintiff would be immeasurably harmed and injured by the presentation and advertisement of the petition which cannot be compensated in damages. Moreover, the presentation of the winding-up petition may be construed as a breach on the part of the plaintiff under its other agreements with other parties. Further, in the event of the banks being advised of the winding-up petition, the plaintiff's bank account may be frozen and this will have an adverse effect on the plaintiff's business operation and financial position.

- g* Further more, if the plaintiff succeeds in the appeals (which are still pending in the Court of Appeal), it is unlikely that any money paid out to the defendant can be recovered. This is particularly evident from the fact that both the partners in the defendant's firm had at one time adjudged bankrupts, *albeit*, the bankruptcy of Mr. Tan Wee Sang, one of the partners had been discharged. As both Mr. Tan Wee Sang and Raja Haris Shah bin Dato Hanif Shah, being partners of the defendant's firm are jointly and severally entitled to the proceeds of the award, any payment made to the account to the share of the said Raja Harris Shah bin Dato Hanif Shah, who will remain an
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undischarged bankrupt will vest in the official assignee, for the official assignee to take necessary action to manage the estate of the said Raja Haris Shah bin Dato Hanif Shah. It is going to be quite unlikely for the plaintiff to recover any payment that may be made to the defendant. In the circumstances, I believe that the appeals, if successful, would be rendered nugatory.

The plaintiff had also shown that it is neither unwilling nor unable to make payment of the award sum, except for the fact that the plaintiff believed that there is a genuine dispute as to the sum payable. For that purpose the plaintiff had sent a cheque no. MBB 212539 for a sum of RM2,067,863.95 being the sum demanded by the defendant, to be kept in the custody of plaintiff's solicitors until the disposal of the appeals. This goes to show that the plaintiff is able to make payment and will make payment if it is so decided on the disposal of the appeals. The plaintiff also undertakes to abide by any order of damages that this court may assess the defendant to have suffered should it subsequently transpire that the orders sought herein were wrongfully granted. The plaintiff's last five years annual report (exh. "TWC-15") clearly indicates that the plaintiff is solvent and able to meet any such claim by the defendant.

On the other hand, the defendant contended that the contract in question, which was signed on 8 March 1989, was wrongfully terminated by the plaintiff in August 1989 *ie*, 11 years ago. The arbitration process began in 1992 and after a long and protracted hearing before the arbitrator and after numerous applications to the High Court, the final award was rendered on 10 May 2000, almost nine years later. One of the partners, Mr. Tan Wee Sang is now 74 years old. To him, if an arbitration award can only be final and binding upon affirmation by the highest court in the country, he is afraid that he may never live to see the fruits of the litigation. (Perhaps he would be able to see the fruits of the litigation faster if he had applied for leave of the High Court under s. 27 of the Arbitration Act 1952 and subsequently enforce it as if he is enforcing a judgment of the High Court. Unfortunately he had not done that until now).

As to the partner's (Mr. Tan Wee Sang) old age (74 years old), it may be true that he may not be able to see the fruits of the litigation as claimed by him, but on the other hand, the converse may also happen. If the plaintiff had paid the sum claimed to the defendant and part of the money goes to Mr. Tan Wee Sang the plaintiff may not be able to get back the sum paid from the defendant if it later succeeds in its appeals. Besides the above, there's no other evidence adduced before me by the defendant for my consideration in its favour under this point.

a Injunction As A Discretionary Remedy

b I must also bear in mind that the remedy that I am asked to administer is discretionary, intended to produce a just result for the period between the date of the application and the disposal of the appeals and intended to maintain the *status quo*, as expressed by Lord Diplock in *Garden Cottage Food Ltd v. Milk Marketing Board* [1984] AC 130; [1983] 2 All ER 770; [1983] 2 WLR 143 and applied in *Cheng Hang Guan & Ors v. Perumahan Farlim (Penang) Sdn. Bhd. & Ors.* [1988] 3 MLJ 90; and *Keet Gerald Francis Noel John v. Mohd. Noor Abdullah & Ors* [1995] 1 CLJ 293; [1995] 1 MLJ 193.

c The evidence adduced before me clearly shows that the debt in question is genuinely disputed by the plaintiff. The matters are now still pending on appeal at the Court of Appeal. The counsel for the plaintiff had informed the court that he had written to the president of the Court of Appeal for an early date for their disposal. The delay in disposal of the appeals is not the fault of the plaintiff. Such being the case, a persuasive statement which I have seen in favour of the plaintiff is that of Kekewich J in *New Travelles Chambers Ltd. v. Cheese and Green* (70 LT 271,272) as cited in *Mann v. Goldstein* [1968] 1 WLR 1098 – “Of course the question whether this is a debt or not may possibly be tried; but it has been said over and over again, that the presentation of a winding-up petition is not a convenient, and often not a proper method of trying a disputed debt. If there is any reasonable ground for disputing the existence of the debt – if the question is not a mere question of quantum, but whether there is in fact a debt or not – a petition ought not to be presented, and therefore the court ought to restrain the presentation of the petition.”

f The balance of convenience which I have stated earlier and the justice of the case lies clearly in favour of the plaintiff. After weighing all the matters, I find that the plaintiff would suffer greater injustice if the relief is withheld.

g Conclusion

Upon careful consideration of the above principle, evidence and submission by the counsels, I am of the view that this is a proper case for granting the injunction applied by the plaintiff. In the circumstances, the plaintiff’s application in encl. 8 herein is allowed with cost.

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